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June 3, 1996

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Office of the Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Notice of Proposed Rule Making
CC Docket No. 96-98

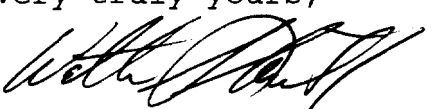
Dear Mr. Caton:

Enclosed please find an original plus four copies of the reply comments of Delmarva Power and Light Co., in response to the Commission's Notice of Proposed Rule Making in CC Docket No. 96-98. Section 1.419(b).

Per the *Separate Comment Filing Procedures for Dialing Party, Number Administration, Public Notice of Technical Changes, and Access to Rights of Way* of that NPRM, three copies of these reply comments are being filed with Ms. Gloria Shambley of the Common Carrier Bureau's Network Services Division, two copies (one of which will be contained on a 3.5 inch diskette formatted in IBM compatible form using MS Dos 5.0 and WordPerfect 5.1 software) are being filed with Ms. Janice Myles of the Common Carrier Bureau, and one copy is being filed with the Commission's copy contractor, International Transcription Services, Inc.

Please contact the undersigned counsel if you have any questions.

Very truly yours,



Walter Steimel, Jr.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In re Matter of | ) | |
| | ) | |
| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

# REPLY COMMENTS OF DELMARVA POWER & LIGHT COMPANY

Submitted by:

DELMARVA POWER & LIGHT COMPANY

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June 3, 1996

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## SUMMARY

Delmarva supports the intent of Congress to provide for new competitive telecommunications opportunities. The Commission should avoid the adoption of unnecessary, repetitive or burdensome rules, and should only adopt those rules required and necessary to effectuate explicit Congressional intent. The particular facilities to which the rules apply should be strictly interpreted within the clear statutory language and Congressional intent.

The Commission should permit utilities flexibility to uniformly apply accepted engineering standards to ensure compliance with applicable safety regulations and standards, and to ensure the reliability of the electrical delivery system. Utilities should be permitted to apply their internal engineering standards to pole attachment requests. The Commission should also permit utilities to apply engineering standards to pole attachment requests to ensure that the mandate of Congress is fulfilled, and that the maximum amount of bandwidth is made available for competitive telecommunications.

Those requesting pole attachments should be required to bear the costs of obtaining rights-of-way or zoning approvals, as well as the costs of construction of additional space where pole utilization has previously been maximized.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In re Matter of | ) | |
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| Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 | ) | CC Docket No. 96-98 |

**REPLY COMMENTS OF DELMARVA POWER & LIGHT COMPANY**

Delmarva Power & Light Company ("Delmarva") by its attorneys, files its reply in the above-captioned proceeding.[1]

In its review of the substantial comments filed in this portion of this proceeding, Delmarva is impressed by the broad range of alternatives posed by the commenting parties. Among the disturbing trends that emerge from these comments are the lack of consensus on the extent to which the Commission should adopt rules, and the willingness of some parties to seek the adoption of rules which go far beyond the scope and intent of the pole attachment[2] requirements set forth in Section 224 of the Act, 47 U.S.C. § 224, as amended.

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[1] Delmarva filed Comments in this proceeding on May 20, 1996, through other counsel. Delmarva respectfully requests that all parties substitute undersigned counsel for Delmarva, and provide courtesy copies of pleadings to undersigned counsel and not original counsel.

[2] The term "pole attachment" is used generally to refer to any attachment, whether to a pole, conduit, duct or other right-of-way. To the extent that a particular facility may necessitate different treatment, Delmarva refers to that particular type of right-or-way.

## I. INTRODUCTION; SCOPE OF REGULATIONS

Many commenters do not seem to be aware of the current trend of the Commission, as reflected in Congressional mandate, away from extensive and burdensome regulations and toward voluntary reliance on established industry practices involving engineering safety and efficiency. Delmarva urges the Commission to continue to follow its current practice of deferring to industry standards where developed and appropriate, and to exercise restraint in the adoption of detailed rules.

In considering any rules, the Commission should (i) give effect to the underlying intent of the legislation; (ii) recognize the explicit directive of Congress to rely upon industry engineering and safety standards; (iii) recognize the rights of property owners effected through state and local zoning and building regulations; and (iv) refrain from the adoption of unnecessary or overly detailed rules.

## II. UNDERLYING INTENT OF LEGISLATION

Delmarva submits that the pole attachment amendments were adopted primarily to maximize the available opportunities for new competitive communications providers and to further the mandate of Congress to the Commission to "make available a rapid, efficient nationwide and worldwide wire and radio communication service with adequate facilities at reasonable charges . . . ." 47 U.S.C. § 151. At the same time, there are certain practical limits to achieving this goal.

A. Maximization of Competitive Access; Bandwidth

In order to fulfill the Congressional mandate, the Commission is required to ensure competitive parity by adopting general standards requiring nondiscriminatory access; however, the Commission must likewise permit utilities to adopt and apply nondiscriminatory and uniform terms and conditions to parties seeking pole attachments.

Delmarva believes that it is Congress' clear intent in requiring pole attachments to enable the maximum number of competitors to enter the marketplace, and to maximize the total available bandwidth. In this regard, Delmarva agrees with U S West, Inc. that carriers requesting attachments "should not be allowed to use pole and conduit space in an inefficient . . . manner." (U S West Comments at 15). The Commission should give effect to Congressional intent by permitting utilities to impose nondiscriminatory terms and conditions which (i) maximize efficiency and economy; (ii) increase total available bandwidth; and (iii) prevent anticompetitive conduct with respect to available pole attachment space.

When competing parties seek pole attachments to a limited resource, utilities should be encouraged to prefer state-of-the-art over obsolete technologies. Additionally, utilities should be encouraged to promote attachment preferences that are not based solely on a first-come, first-served basis, but on the ability or willingness of parties to deploy the greatest bandwidth for the broadest possible use. Not only would such a

policy encourage efficient use of limited space in the near term, it would also help to preserve space for pole attachments for future technologies. Multiple attachments by multiple parties make little sense if the public benefit of "rapid . . . nationwide . . . service . . . at reasonable charges" is lost in the process.

B. Rights-of-Way to Which Statute and Rules Apply

Delmarva believes it is imperative for the Commission to recognize the property interests subject to its pole attachment mandate. Delmarva believes that it was not the intent of Congress to require pole attachments on bare easements or bare rights-of-way where no improvement has taken place; that is, where there is no improvement upon which an attachment can be made. The original legislative history of the 1978 Amendments supports this conclusion. There, Congress defined "pole attachment" to mean "any attachment . . . to a pole, duct, conduit or right-of-way owned or controlled by a utility."[3] Inarguably, something can only be attached to an improved right-of-way.

Delmarva also opposes mandated access on improvements which are not being used for any purpose other than to ensure reliability. A primary example of this concept is the installation of unused conduits. In the event of an outage or disruption in an electrical service conduit, a parallel unused

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[3] Pub. L. No. 95-234, §6, 92 Stat. 35 (codified at Section 224(a)(4)) (emphasis added).

conduit is used to rapidly restore service, bypassing the damaged conduit. The damaged conduit can then be repaired or replaced under lesser time constraints. A utility should be permitted to reserve unused space for such reliability purposes.

Furthermore, Delmarva believes that non-discriminatory access with respect to pole attachments is only mandated when there is an improvement on the right-of-way that is in use for communications purposes. Congress made clear in the 1978 Conference Report that it was focused only on improvements that were actually being used to provide telecommunications by stating that

> Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable.[4]

This principle appears to have been carried into the revisions to the Communications Act finally adopted by Congress. Section 224(a)(1) defines a utility as "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." (emphasis provided) As the pole attachment obligation under Section 224(f) only applies to a "utility" as defined in Section 224, it would not apply when a right-of-way was not being used for wire communications. Common sense dictates this result, as recognized by UTC and Edison Electric Institute, that denial of access to dormant facilities is non-discriminatory under Section 224(f)(2)

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[4] S. Rep. No. 580, 95th Cong., 1st Sess. 15, reprinted in 1978 U.S.C.C.A.N. 120, 123 (emphasis added).

of the Act, as "there can be no unreasonable discrimination if no one is allowed access." (UTC/EEI Comments at 6).

C. Mandatory Restructuring Where Full Capacity Exists

Delmarva opposes any suggestion that, in instances where an existing pole or conduit has been filled to capacity before a new party requesting access arrives, the Commission require that the utility consider other alternatives within the existing rights-of-way including the "replacement of poles or conduit to provide more capacity and a sharing of those costs . . ." (NEXTLINK Comments at 6). Where maximum capacity has been achieved, there exists, by definition, insufficient capacity to add more attachments. Where insufficient capacity exists, utilities clearly may deny access under Section 224(f)(2) of the Act. As GTE Service Corporation notes in its comments, "[a]t that point [of maximum capacity], new providers will be in the same situation LECs and electric utilities have always been in -- they will have to build their own facilities." (GTE Comments at 31).

Delmarva notes that GTE's comments reflect the current practice with regard to new pole attachment requests. When someone requests a pole attachment, all parties currently attached to the pole and the new requesting party meet at the pole or poles under consideration. If a determination is made that maximum capacity has been achieved and that there is no room for additional attachments, and the new requesting party still wants to attach, that new party must pay all of the costs of

upgrading the pole to accommodate the new attachment, and none of the costs are borne by the parties already on the pole.

Delmarva notes that the situation is different when the issue is one of inclusion in a conduit. When a conduit is filled to capacity, a request to be in the conduit is simply denied. The fundamental practical differences between poles and conduits make the reasons for this policy fairly obvious. Delmarva requests that the Commission keep current practice intact.

## III. ENGINEERING AND SAFETY STANDARDS

### A. Adoption of Standards

A number of commenters address the engineering and safety standards that could be applied by utilities when permitting, denying, evaluating or regulating attachments. Many request the Commission to either strictly construe these standards, adopt a variety of new engineering and safety standards, or limit utilities' ability to apply certain standards to pole attachment requests.

A number of widely recognized industry associations, in addition to federal, state and local jurisdictional authorities, have established extensive safety and engineering standards which would address most, if not all, of the issues which would arise under any pole attachment scenario. It would be a time consuming and cumbersome undertaking for the Commission to sort through these standards and either adopt specific standards or create a new set of standards in an attempt to anticipate every condition. Such an effort also would be contrary to current deregulatory

trends noted above. Delmarva believes that an attempt to adopt detailed safety and engineering regulations would devolve into a debate between parties intent on advancing their own interests at the expense of legitimate safety and engineering concerns. Given the extensive number of standards which occupy this area, it should be sufficient for a utility to cite to an established and recognized standard when denying access or requiring modifications to a particular attachment.

B. Internal Utility Standards

Delmarva agrees with American Electric Power Service Corporation (AEPSC), et al., that determinations regarding whether sufficient capacity exists to allow access should be based in part on "internal electric utility construction and specification standards." (AEPSC Comments at 22; *see also* UTC/EEI Comments at 8). These standards include those imposed by the utility to ensure the reliability of the basic electric utility grid. Utilities should also be permitted to rely on engineering standards and concepts to maximize capacity where attachments are being made.

In addition, utilities should be permitted to require a certain level of engineering or capacity development to meet anticipated demand and growth and to minimize costs and modifications. Such regulations would be in compliance with Congressional intent if used to ensure maximum use of the limited space which may be available in many situations.

C. Burden of Proof

In its Comments, Delmarva states that a utility should bear the burden of proof when denying attachments or requiring modifications to attachments. In light of the comments of other parties on this issue and the possible confusion raised, Delmarva wishes to comment more specifically on its original statement.

Delmarva believes that it is reasonable to require a utility to specify the grounds upon which it denies an attachment or requires modifications to an attachment. As a matter of practice, a utility would usually cite the reasons for denial or requirement of modification, and it is only reasonable to require a minimum level of notification in support of a denial. Once a utility cites to a recognized engineering or safety standard in support of its denial or requirement for modification, however, the initial burden of proof has been met.

Thereafter, it should be incumbent upon anyone opposing the utility's determination to demonstrate that the standards relied upon are not applicable, not generally recognized, or have not been appropriately applied by the utility. When there is a dispute regarding a denial or requirement for modification, these matters should be addressed in a complaint proceeding before the appropriate agency, with the ultimate burden on the complaining party. Delmarva believes there is no further need for detailed rules by the Commission at this time.

## IV. LOCAL ZONING RULES AND PROPERTY RIGHTS

In the new legislation, Congress seems to recognize that states and localities may have a variety of restrictions on rights-of-way which should be honored by all parties, including the Commission. It is a basic tenet of law that one cannot convey any greater rights than one has. Delmarva agrees with the observation of GVNW Inc./Management that

> [a]ny requirements that the FCC implements regarding right-of-way must allow for the terms of the existing easements or franchises under which the right-of-way was obtained, and the laws governing the use of, and compensation for the use of, property, in the locality or state. In many areas, public bodies (cities, counties) grant easements for specific uses only. (GVNW Comments at 9).

Recognizing these facts, in many situations a party requesting an attachment will need to obtain additional or revised rights-of-way in order to implement a requested attachment. A party requesting attachment, therefore, should be required to seek any additional rights, approvals or licenses, at its own expense, in order to effectuate the attachment. These expenses should be deemed to be different than the cost of providing space noted in subsection e(2) and (3) of Section 224 of the Act, as those subsections appear to reference physical construction costs, and not legal or administrative costs resulting from an attachment.

This approach is supported by the Conference Report which accompanied the 1978 Amendments, wherein Congress stated that

> [A]ny problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC . . . pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws.[5]

Delmarva is also concerned about the liability exposure that could result from permitting multiple attachments in a potentially hazardous environment. Delmarva requests that the Commission permit utilities and pole owners the flexibility to address liability issues contractually. So long as any such contractual provisions are applied on a non-discriminatory basis to all persons requesting attachments, the utility or pole owner should have maximum flexibility to contractually allocate the risks and liabilities for harm or damage occurring to persons or property, including liability for any interruption to utility service resulting from an attachment. As stated in AEPSC's comments, "electric utilities face serious risks of tort liability and, in fact, are subject to specific, significant insurance requirements under state laws and regulations." (AEPSC Comments at 26). Consequently, "utilities must be able to condition access on an attaching party's agreement to indemnify and hold the utility harmless from the consequences of any actual or claimed violation of a standard." (AEPSC Comments at 27).

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[5] S. Rep. No. 580, 95th Cong., 1st Sess. 16, reprinted in 1978 U.S.C.C.A.N. 120, 124.

## V. CONCLUSION

Delmarva supports the intent of Congress to provide for new competitive telecommunications opportunities. The Commission, however, should resist the temptation and urging of some parties to stifle this process and overly complicate its implementation through the use of unnecessary, repetitive or burdensome rules, and should only adopt those rules required and necessary to effectuate explicit Congressional intent. Delmarva recognizes that this proceeding is more akin to a notice of inquiry on these issues and anticipates that the Commission may be proposing rules in the near future. Delmarva looks forward to the opportunity to comment further on these and other issues at that time.

Respectfully submitted,

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